Order Code RL32446

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Congress's Power Under the Commerce Clause: The Impact of Recent Court Decisions

June 23, 2004

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Summary

From 1937 to 1995, fostered by expansive Supreme Court jurisprudence, the United States Congress operated under a generous view of its authority under the Commerce Clause that permitted the federal courts to consider the cumulative effects of legislation when determining whether a congressional action substantially affected interstate commerce. During that period no congressional legislation had been held unconstitutional under the Commerce Clause. In 1995, and again in 2000, however, the Court held two statutes, the Gun Free School Zones Act and the Violence Against Women Act, unconstitutional as exceeding Congress's authority under the Commerce Clause. These cases arguably created a tension between an expansive view of the Commerce Clause exemplified by the "aggregation theory," and a more constrained view aided by the distinction between "economic" and "non-economic activity." Starting in 2003, the Ninth Circuit Court of Appeals began utilizing the Supreme Court's more modern analysis to find federal legislation that makes the possession of child pornography, and homemade machineguns unconstitutional on the grounds that the statutes exceeded the scope of Congress's power under the Commerce Clause. In addition, the Ninth Circuit has held sections of the Controlled Substances Act unconstitutional insofar as they require the prosecution of persons for possessing and using marijuana for approved medicinal purposes.

These statutes were each found to be too great an intrusion into what have been traditionally local matters and as such could not be sustained under the Commerce Clause. Should the Supreme Court grant *certiorari* and uphold any of these cases, the result could potentially be a further erosion of Congress's ability to regulate criminal behavior that occurs primarily intrastate. Such an erosion could have an impact not only on traditional criminal legislation, but also on terrorism and homeland security related legislation. While there may be other available sources of constitutional power, the Commerce Clause has traditionally been relied upon when legislating in these areas; therefore, federal case law discussing alternative sources of power is scarce.

This report will first review the current Supreme Court case law with respect to the Commerce Clause. Second, it will examine the analysis used and the results of the three lower court opinions. Finally, two areas of tension that appear to exist within the Court's jurisprudence, and the potential implications that resolution of these conflicts may have on congressional power under the Commerce Clause will be examined.

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Congress's Power Under the Commerce Clause: The Impact of Recent Court Decisions

From 1937 to 1995, fostered by an expansive Supreme Court jurisprudence, the United States Congress operated under a very generous view of its authority under the Commerce Clause. During that period no congressional legislation was held unconstitutional for violating the Commerce Clause. In 1995, and again in 2000, however, the Court held two statutes, the Gun Free School Zones Act and the Violence Against Women Act, unconstitutional as exceeding Congress's authority under the Commerce Clause. In 2003, the Ninth Circuit Court of Appeals issued three opinions holding three different federal statutes unconstitutional applying the analysis of the Supreme Court. These cases, should they be upheld, potentially represent a further erosion of Congress's ability to regulate the possession of contraband that it decides has a substantial effect on interstate commerce. Should the analysis used in these cases be adopted by the Supreme Court, it could have a major impact on Congress's ability to legislate regarding crime, drugs, and potentially terrorism unless an alternative source of authority can be found.

Current Supreme Court Commerce Clause Jurisprudence

To fully understand the scope of Congress's power to regulate interstate commerce, it is important to begin with an examination of the reasoning and analysis of the Court's 1937 decision in *Wickard v. Fliburn*, which led to the expansive view of the Commerce Clause that Congress operated under until 1995. This case involved Mr. Filburn, who was the operator of a small Ohio farm where he grew wheat for personal consumption.[1] Mr. Filburn asked the Court to determine whether, under the Commerce Clause, amendments to the Agricultural Adjustment Act of 1938, which implemented a quota system to restrict the amount of wheat that could be harvested and sold, applied to individuals who produced and consumed homegrown bushels of wheat.[2]

In upholding the statute as constitutional, the Court expressly rejected previous decisions that had held "activities such as production, manufacturing and mining [to be] strictly local and . . . cannot be regulated under the commerce power because

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[1]*Wickard v. Filburn*, 317 U.S. 111, 113-114 (1942). In 1941, Mr. Filburn harvested an excess amount of 239 bushels for which he was fined $117.11 pursuant to amendments to the Agricultural Adjustment Act of 1938. *Id.* at 114.

[2]*Id.*

their effects upon interstate commerce are, as a matter of law, only indirect."[3] The Court stated that neither the subject of the regulation, nor whether the regulated activity was "local" was dispositive of Congress's power under the Commerce Clause. Rather, the Court held that economic activities, regardless of their nature, could be regulated by Congress if the activity "asserts a substantial impact on interstate commerce . . . ."[4] The Court reasoned that Filburn's growing of wheat, even if only for his family's personal consumption, provided him with an alternative to the marketplace and, therefore, the production was in direct competition with the wheat on the market.[5] Although the Court admitted that Filburn's production alone would have a negligible impact on the overall price of wheat, the Court held that, when combined with other such personal producers, the effect would be substantial enough to make them subject to Congressional regulation.[6] The rationale of combining individual effects to find substantial impacts on interstate commerce has become known as the "aggregation theory," and represents the most far reaching example of Congress's authority to regulate under the Commerce Clause.[7]

The Court's decision in *Wickard* recognized that there had been a shift in the way that businesses operated in the United States. No longer were there merely local or even regional businesses, but now there were truly national interests that required an expansive view of Congress's power under the Commerce Clause. While never deciding that this expansive view was without limits, the Court continued to hold that a "rational basis" existed for Congress to enact laws under the theory that the regulated behavior substantially affected interstate commerce.[8] Despite the consistency of these decisions, it was not always clear whether the activity in question met the "substantially affected" test. In 1995, the Court explored the limits of the "substantial affects" test. In *United States v. Lopez,* the Court reviewed the constitutionality of the Gun Free School Zones Act of 1990, which made it a federal offense for "any individual to knowingly possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[9]

The Court reasoned that for the Gun Free School Zones Act to be held constitutional it would have to be a regulation substantially affecting interstate commerce, as the law did not effect either the channels or instrumentalities of interstate commerce. In determining what constitutes a substantial affect, the Court cited favorably previous cases upholding congressional acts that regulated intrastate

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[3] *Id.* at 119 (*citing Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936)) (internal quotation marks omitted).

[4] *Id.* at 125.

[5] *Id.* at 128.

[6] *Id.*

[7] *See United States v. Lopez*, 514 U.S. 549, 560 (1995).

[8] *See e.g.,Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981); *Perez v. United States*, 402 U.S. 146, 155-156,(1971); *Katzenbach v. McClung,*379 U.S. 294, 299-301 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253 (1964).

[9] 18 U.S.C. § 922(q)(1)(A) (1990).

coal mining,[10] intrastate extortionate credit transactions,[11] restaurants using interstate supplies,[12] and hotels catering to interstate guests.[13] In addition, the Court even cited favorably to *Wickard*, concluding that where "economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[14]

Applying this standard to the Gun Free School Zones Act, the Court held that the law did not, either by itself or in the aggregate, substantially affect interstate commerce. The Court identified three reasons why the statute failed to demonstrate a substantial affect on interstate commerce. First, the Court held that because the act was a criminal statute it did not, by definition, affect any sort of economic enterprise.[15] While previous cases have carved out an exception for criminal statutes that arise out of or are connected to a larger regulatory scheme, the Court held that the Gun Free School Zones Act did not qualify for this exception.[16]

Second, the Court found that the statute "contains no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce."[17] Here, the Court emphasized the statute's failure to connect possession of a firearm near a school with interstate commerce. Relying on *United States v. Bass*, a 1971 case that overturned a firearm conviction for failure to show a nexus to interstate commerce,[18] the Court concluded that the Gun Free School Zones Act was not sufficiently limited to "firearms possessions that additionally have an explicit connection with or effect on interstate commerce."[19]

Finally, the Court noted the absence of legislative findings with respect to the statute's effect on interstate commerce.[20] While the Court noted that the Congress is not formally required to make such findings, it nevertheless held that "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."[21]

The Court's decision in *Lopez* represented the first time since 1937 that a statute was held to be unconstitutional as exceeding Congress's power under the Commerce

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[10]*Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981).

[11]*Perez v. United States*, 402 U.S. 146 (1971)

[12]*Katzenbach v. McClung*, 379 U.S. 294 (1964)

[13]*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[14]*Lopez*, 514 U.S. at 560.

[15]*Id.* at 561.

[16]*Id.*

[17]*Id.*

[18]*United States v. Bass*, 406 U.S. 336, 347 (1971).

[19]*Id.* at 562

[20]*Id.*

[21]*Id.* at 563.

Clause. It was not clear, however, whether the decision was limited to the specific statute before the Court, or if the decision signaled a major shift in the Court's jurisprudence. In 2000, the Court again ruled on a case involving the limits of Congress's power under the Commerce Clause.

In *United States v. Morrison*,[22] the Court invalidated the Violence Against Women Act, which specifically created a private right of action against anyone who committed such a crime, allowing an injured party to obtain damages and other compensatory relief.[23] In evaluating the constitutionally of the statute the Court determined that its holding in *Lopez* was the controlling precedent and proceeded to apply its reasoning.

Applying *Lopez*, the Court first concluded that the activity regulated by the act could not be classified as "economic activity."[24] This determination proved crucial because characterizing the activity as non-economic in nature allowed the Court to avoid applying the aggregation principle established by *Wickard*. The Court, however, stopped short of establishing a rule that all non-economic activity cannot be aggregated.[25] Second, the Court considered whether the act contained a jurisdictional element that would support the argument that a sufficient nexus existed between gender-motivated violence and interstate commerce. The Court concluded that similar to the statute in *Lopez*, the act contained no jurisdictional element connecting a federal cause of action to Congress's power to regulate interstate commerce.[26] Therefore, "Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime."[27]

In *Morrison*, unlike in *Lopez*, there were numerous congressional findings, however, the Court stressed that findings by the legislative branch merely serve to illuminate the relationship between the regulation and interstate commerce, and as such are not dispositive of the constitutionality of the regulation. Constitutionality, according to the Court, ultimately turns on the legal aspects of the substantial effects

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[22] *United States v. Morrison*, 529 U.S. 598 (2000).

[23] 42 U.S.C. § 13981 (2000). In *Morrison*, a female plaintiff brought suit under the act against two men who had allegedly assaulted and raped her. The plaintiff asserted that her right to be free from gender associated violence had been violated, and therefore, she was entitled to monetary damages. *See Morrison*, 529 U.S. at 599 (2000).

[24] *Morrison*, 529 U.S. at 613 (stating that "[g]ender-motivated crimes are not, in any sense of the phrase, economic activity.").

[25] *Id.* (stating that "we need not adopt a categorical rule against aggregating the effects of any non-economic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of interstate activity only where that activity is economic in nature.").

[26] *Id.*

[27] *Id.*(stating that "whether particular operations affect interstate commerce to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.") (internal citations and quotation marks omitted).

doctrine, and therefore, is for the Court to decide.[28] In this case, the Court found that the legislative findings detailing the effects on interstate commerce by gender motivated violence were based in large part on the "costs of crime," which was nearly identical to the reasoning expressly rejected by the Court in *Lopez*. According to the Court, to accept the reasoning of Congress would supply the national legislature with the power to "regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption."[29]

Finally, the Court considered the level of attenuation between the regulated activity and its effect on interstate commerce. In this case, the Court concluded that the regulation of gender-motivated violent crime was not directed at the instrumentalities, channels or goods involved in interstate commerce, and therefore, beyond the scope of Congress's authority.[30]

In sum, after *Lopez* and *Morrison*, the test to determine whether a regulation has a substantial effect on interstate commerce requires reviewing courts to consider the following four factors: (1) whether the regulated activity is commercial or economic in nature; (2) whether an express jurisdictional element is provided in the statute to limit its reach; (3) whether Congress made express findings about the effects of the proscribed activity on interstate commerce; and (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated.[31]

Recent Lower Court Developments in Commerce Clause Jurisprudence

In 2003, the Ninth Circuit Court of Appeals issued three separate decisions, each holding portions of federal statutes regulating possession of child pornography, the possession of certain firearms, and the possession of certain controlled substances unconstitutional as beyond the scope of Congress's authority to regulate interstate commerce.

In *United States v. McCoy*, the federal government brought an indictment charging Rhonda McCoy with violating 18 U.S.C. § 2252(a)(4)(B), which states [32]that

[28]*Id.*

[29]*Id.* at 615.

[30]*Id.* at 618 (holding that "the regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.").

[31]*United States v. Stewart*, 348 F.3d 1132, 1136-37 (9thCir. 2003)(*citing Morrison*, 529 U.S. at 610-12).

[32]*United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003). Both Mr. and Mrs. McCoy were charged with violating 18 U.S.C. § 2251(b) after photographs depicting Mrs. McCoy and her daughter in sexually suggestive positions were reported to the U.S. Naval Criminal Investigation Service. *Id.* After a trial in which Mr. McCoy was acquitted, the government (continued...)

> (a) any person who . . .(4). . . (B) knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer if –
>
> (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (ii) such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section.[33]

Mrs. McCoy challenged the portion of the statute authorizing punishment if the depiction is made with objects that have traveled in interstate commerce as a violation of Congress's authority under the Commerce Clause.

A three judge panel of the Ninth Circuit Court of Appeals concluded that the *Morrison* four part test was controlling in this situation and proceeded to analyze the statute by applying those factors.[34] The court began with the first factor, considering whether the activity involved here was economic in nature. Mrs. McCoy argued that under *Morrison*, the simple intrastate possession with no intent to distribute in interstate commerce could not properly be characterized as commercial activity.[35] On the other hand, the government relied not on *Morrison*, but rather on *Wickard v. Filburn,* arguing that "the possession of such matter is the reason interstate trafficking in such obscenity exists."[36] The government's contention was that all pictures of this type are a part of interstate commerce even if the picture was of a defendant's own child, locally produced, and solely for personal use. The court concluded that the McCoy's photograph and Filburn's wheat were not analogous.[37] The court argued that Filburn's wheat competed with the interstate wheat market in a way that contravened the intention of the Agriculture Act, while McCoy's photograph does not, according to the court, compete with or affect the interstate child pornography market in any way. Thus, the court concluded that "simple intrastate possession of home-grown child pornography not intended for distribution or exchange is not in any sense of the phrase economic activity."[38]

The court then shifted to the fourth *Morrison* factor, an analysis of the attenuated effect. On this issue, the court concluded that the connection between intrastate possession of child pornography and interstate commerce is too attenuated

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[32](...continued)
amended the charges against Mrs. McCoy to include a violation of 18 U.S.C. § 2252(a)(4)(B). *Id.*

[33]18 U.S.C. § 2252(a)(4)(B) (2003).

[34]*See McCoy*, 323 F.3d at 1117-19.

[35]*Id.* at 1120.

[36]*Id.* (*citing* Gov't Br. at 13) (internal quotation marks omitted).

[37]*Id.* at 1122 (stating that "McCoy's photograph is much farther removed from interstate activity than Filburn's wheat.").

[38]*Id.* at 1122-23 (internal quotations and citations omitted).

to warrant use of Congress's commerce power. The government argued that Congress's authority can extend to intrastate activity if it determines "that doing so is necessary to regulate the national market."[39] The court held that the statute in question does not establish the type of "direct or substantial relationship necessary to justify the invocation by Congress of its Commere power in order to regulate intrastate criminal activity."[40]

With respect to the remaining *Morrison* factors the court concluded that while the statute in question does contain a sufficient jurisdictional element that alone will not create the requisite basis for use of Congress's Commerce power. Finally, the court turned to the statute's legislative history. The court concluded, however, that "[a]t most the legislative history here tells us that Congress intended to eliminate the interstate commercial child pornography market and nothing more."[41]

Concluding that the statute as applied to Mrs. McCoy satisfied only one of the four *Morrison* factors, the court declared it an unconstitutional exercise of Congress's Commerce power, and reversed the decision of the District Court.[42]

In *United States v. Stewart*, a licensed gun dealer was charged with five counts of possession of a machinegun in violation of 18 U.S.C. § 922(o), which makes it unlawful to "transfer or possess a machinegun."[43] As in *Lopez*, *Morrison*, and *McCoy*, *Stewart* presented the court with a federal statute that, as applied to a specific situation, tests the limits of Congress's ability to regulate interstate commerce. Previous courts had held that section 922(o) was constitutional because the regulation may have substantially effected interstate commerce.[44] In light of the *Morrison*

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[39]*Id.* at 1123.

[40]*Id.* at 1124.

[41]*Id.* at 1127 (*citing* U.S. Dep't of Justice, *Attorney General's Commission on Pornography: Final Report* (1986).

[42]It is important to note that this analysis and conclusion differs from the analysis and conclusions reached by other federal circuit courts. For example, in both *United States v. Bauch*, an Eighth Circuit decision, and *United States v. Robinson*, a First Circuit decision, the rationale for upholding the statute as a constitutional exercise of the Commerce Clause was the fact that the camera parts, such as the film, moved through interstate commerce and therefore could provide a sufficient jurisdictional nexus to interstate commerce. *See generally, United States v. Bausch*, 140 F.3d 739 (8th Cir. 1998) *cert denied* , 525 U.S. 1072 (1999); *see also United States v. Robinson,* 137 F.3d 652 (1st Cir. 1998). The Ninth Circuit opinion distinguishes these cases on the basis that they were decided prior to *Morrison* and therefore do not take into account the Supreme Court's jurisprudence with respect to further limits on the Commerce Clause. *See McCoy*, 323 F.3d at 1121-22.

[43]*Id.* at 1134 (*citing* 18 U.S.C. § 922(o) (2003)). Mr. Stewart was suspected by the Bureau of Alcohol, Tobacco and Firearms (ATF) of selling parts kits that could be used to convert rifles into unlawful machineguns in violation of federal law. While executing a search warrant, ATF seized five machine guns that had been assembled by Mr. Stewart entirely at home from what were apparently legal parts. *See United States v. Stewart*, 348 F.3d 1132,1133 (9th Cir. 2003).

[44]*See United States v. Wright*, 117 F.3d 1265, 1268-71 (1997); *United States v. Rybar,* 103 (continued...)

factors, however, it appeared to this panel that this conclusion was no longer in accordance with the Supreme Court's interpretation of Congress's commerce power.

Utilizing the same analysis adopted by the court in *McCoy*, the court began by analyzing the first and fourth *Morrison* factors. The court concluded that this statute was more like the statute struck down in *Lopez*, rather than the statute upheld in *Wickard*. The court reasoned that "a homemade machinegun may be part of a gun collection or may be crafted as a hobby. . . . Whatever its intended use, without some evidence that it will be sold or transferred – and there is none here – its relationship to interstate commerce is highly attenuated."[45] In addition, the court pointed out that unlike the wheat regulation in *Wickard* there was no evidence that section 922(o) was intended to regulate the commercial aspects of the machinegun business, but rather to keep these types of guns out of the hands of criminals. With respect to the fourth factor, attenuated effect, the court analogized the case to *McCoy* by concluding that the guns in Stewart's possession "functioned outside the commercial gun market. His activities did not increase machinegun demand. Nor can we even say that Stewart's homemade machineguns reduced overall demand. . . . Thus, the link between Stewart's activity and its effect on interstate commerce is simply too tenuous to justify federal regulation."[46]

The court also discussed the statute's failure to satisfy the other two *Morrison* factors. The court pointed out the fact that the possession statute contained no jurisdictional nexus, which indicated that it was not limited in anyway to interstate commerce. In fact, the court went so far as to distinguish section 922(o) from other federal firearms statutes on the grounds that other statutes utilize language connecting the firearms to interstate commerce. According to the court, other firearms statutes have used language dealing with "*transactions, sales* or *deliveries* of firearms, and nearly all of the provisions specifically require that the transaction, sale, or delivery be conducted interstate."[47] Further, the court pointed out that there were no legislative findings indicating a connection between the statute and interstate commerce. Instead, the legislative history, as referenced by the court, addressed the need for additional law enforcement measures to prevent interstate and international machinegun transactions. In light of the legislative history, the court was able to conclude that

> [n]othing in the legislative history suggests that Congress ever considered the impact of purely intrastate possession of homemade machineguns on interstate commerce, and there is no reason to assume that prohibiting local possession of machineguns would have the same national and commercial consequences as prohibiting the interstate and foreign traffic in firearms. We therefore cannot

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[44](...continued)
F.3d 273 276-85 (3d Cir. 1996); *United States v. Kenney*, 91 F.3d 884, 890-91 (7th Cir. 1996).

[45]*Stewart*, 348 F.3d at 1137.

[46]*Id.* at 1138.

[47]*Id.* at 1139 (emphasis in original).

> import these earlier legislative findings to give section 922(o) constitutional grounding.[48]

Because the statute failed to address a commercial activity; provided an attenuated link to interstate commerce; lacked a jurisdictional nexus; and did not contain any legislative findings connecting its purpose to regulating interstate commerce, the court concluded that Congress exceeded its commerce power when it enacted section 922(o) making mere possession of a machinegun illegal.

The final case in this trilogy, *Raich v. Ashcroft*, involves a conflict between California's Compassionate Use Act[49] and the Controlled Substances Act (CSA).[50] The appellants in this case were individuals who grow and/or use marijuana for medical purposes.[51] They filed this suit seeking declaratory relief and an injunction preventing the U.S. Attorney General from prosecuting them under the CSA based on its unconstitutionality as applied to their specific situations.[52] The court found that the appellants demonstrated a strong likelihood of success on the claim that as applied to them the CSA exceeds Congress's Commerce Clause power.[53]

In reaching this conclusion the court first had to address the fact that the Ninth Circuit had previously held the CSA constitutional in the face of Commerce Clause challenges.[54] To do this the court constructed a narrow definition of the "class of activity" encompassed. The court cited the fact that none of the previous cases involved the possession or cultivation of marijuana for medical purposes and concluded that this type of use is more limited than either the broader illicit drug use,

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[48]*Id.* at 1140.

[49]Cal. Health & Safety Code § 11362.5 (1996) (allowing the use of marijuana for medical purposes upon the recommendation of a licensed physician).

[50]21 U.S.C. § 841(a)(1) (2003) (classifying marijuana as a schedule 1 controlled substance and as such making it illegal to "manufacture, distribute or dispense, or possess with the intent to manufacture, distribute, or dispense a controlled substance" unless provided for in the statute).

[51]According to the court one of the named defendants, Raich is unable to grow her own marijuana, however, she receives the drug free of charge from two unnamed individuals who intervened to protect Raich's supply. *Raich v. Ashcroft,* 352 F.3d 1222, 1230 n.3 (9th Cir. 2003).

[52]*Id.* at 1224.

[53]*Id.* While the Supreme Court has previously addressed issues relating to the CSA in light of California's medical marijuana statute, it did not decide the case on Commerce Clause grounds. *See United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 n.7 (2001)("Nor are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress' power under the Commerce Clause").

[54]*See Raich*, 352 F.3d at 1227 (*citing United States v. Bramble,* 103 F.3d 1475, 1479-80 (9th Cir. 1996); *United States v. Tisor*, 96 F.3d 370, 375 (9th Cir. 1996); *United States v. Kim*, 94 F.3d 1247, 1249-50 (9th Cir. 1996); *United States v. Visman,* 919 F.2d 1390, 1393 (9th Cir. 1990); *United States v. Montes-Zarate,* 552 F.2d 1330, 1331 (9th Cir. 1977); *United States v. Rodriquez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972)).

or the broader commercial use.[55] Having distinguished the activity in this case from the precedent, the court, relying on *McCoy*, found the class of activity to be the "intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law."[56]

With this narrowly defined class of activity the court proceeded through the *Lopez/Morrison* analysis, applying the four factor *Morrison* test. With respect to the first factor, the court concluded that given the narrow class of activity the "cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity."[57] This conclusion allowed the court to avoid the aggregation principle established in *Wickard*. Thus, the court concluded, drawing on comparisons to the photograph in *McCoy*, that the marijuana in this case was for personal use and was in no way intended for the kind of sale or exchange that would make it commercial in nature. Therefore, according to the court, the CSA does not satisfy the first *Morrison* factor. Next, the court considered whether the CSA contains an express jurisdictional element that would limit its reach to those cases that substantially effect interstate commerce. With no analysis, and apparently persuaded by the reasoning of a district court opinion, the court concluded that "[n]o such jurisdictional hook exists in the relevant portions of the CSA."[58]

With respect to whether the legislative history contains congressional findings regarding the effects on interstate commerce, the court was able to cite findings relating to the effect that intrastate drug trafficking activity would have on interstate commerce.[59] While admitting that the legislative history lends support to the constitutionality of the statute under the Commerce Clause, the court proceeded to diminish the importance of these findings by arguing that they were not specific to either marijuana or the medicinal use of marijuana, but rather related to the general effects of drug trafficking on interstate commerce.[60] In addition, the court referred to language in *Morrison*, discussing the limited role of congressional findings.[61] Moreover, the court referenced *McCoy's* conclusion that the first and fourth prongs

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[55] *Raich*, 352 F.3d at 1228 (stating that "this limited use is clearly distinct from the broader illicit drug market – as well as any broader commercial market for marijuana – insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce.").

[56] *Id.* at 1229.

[57] *Id.* at 1230.

[58] *Id.* at 1231 (*citing County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1209 (N.D. Cal. 2003)).

[59] *Id.* at 1232 (*citing* 21 U.S.C. § 801, which states that "federal control of intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents such as traffic.").

[60] *Id.* at 1232.

[61] *Id.* (*citing Morrison*, 529 U.S. at 614).

of the *Morrison* test – whether the statute regulates an economic enterprise and whether the link is attenuated – are the most significant factors to the analysis.[62]

Finally, with respect to whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated, the court expressed doubt that the interstate effect of homegrown medical marijuana is substantial. Citing authority questioning the validity of the federal government's claim of an effect on interstate commerce,[63] the court concluded that "this factor favors a finding that the CSA cannot constitutionally be applied to the class of activities at issue in this case.[64]

The above mentioned cases are not the only cases that have addressed the constitutionality of these statutes, nor do they represent the only theories used by the various circuits.[65] These cases, however, appear to be the only appellate court cases decided after the Supreme Court's 2000 decision in *United States v. Morrison*. Thus, these cases take into account precedent that the previous circuit courts did not consider when issuing their rulings. The failure to consider *Morrison*, however, does not mean that the results from the other circuits are any more or less valid, nor does it require a different conclusion. It merely provides a way of distinguishing the results from the present cases. In fact, the absence of a genuine circuit split on the application of the Commerce Clause to these statutes may lead the Supreme Court to require more decisions by different circuit courts before a case of this type is granted *certiorari*.

Potential Implications for Congress's Power to Regulate Under the Commerce Clause

While each of the cases discussed above involved different federal statutes, there are similarities in the analysis and application of the standards that may need to be addressed by the Supreme Court. A review of these cases presents two potential areas of tension within Commerce Clause jurisprudence that the Supreme Court may attempt to clarify. First, the Court may wish to more clearly define or establish standards assisting both the Congress and the lower federal courts with

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[62]*Id.* at 1232-33 (*citing McCoy*, 323 F.3d at 1119).

[63]*Id.* at 1233 (*quoting Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (stating that "[m]edical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce. Federal efforts to regulate it considerably blur the distinction between what is national and what is local.") (Kozinski, J., concurring)).

[64]*Id.*

[65]For an example of an alternative theory on the commerce clause, *see United States v. Angle*, 234 F.3d 326, 337-38 (7th Cir. 2000) (adopting a "market theory" approach and reasoning that "[b]y outlawing the purely intrastate possession of child pornography in § 2252(a)(4)(B), Congress can curb the nationwide demand for these materials. We believe that such possession, 'through repetition elsewhere,' helps to create and sustain a market for sexually explicit materials depicting minors."); *see also United States v. Rodia*, 194 F.3d 465 (3d Cir. 1999), *cert denied*, 529 U.S. 1131 (2000) (holding 18 U.S.C. § 2251(a)(4)(B) constitutional);*United States v. Kenney*, 91 F.3d 884, 890-91 (7th Cir. 1996) (holding 18 U.S.C. § 922(o) constitutional); *United States v. Bramble,* 103 F.3d 1475, 1479-80 (9th Cir. 1996) (holding the federal Controlled Substances Act constitutional).

respect to what types of activities can be classified as "non-economic" in nature. Second, the Court may decide to examine and further develop standards with respect to the circumstances when the expansive aggregation theory established in *Wickard v. Filburn* applies, as opposed to the more restrictive interpretation of the Commerce Clause utilized in both *Lopez* and *Morrison*.

That a distinction between economic and non-economic activity can be drawn is asserted by the Court in *Lopez* without any clear analysis establishing criteria for determining the difference. The Court merely asserts that "the possession of a gun in a local school zone is in no sense an economic activity that might through repetition elsewhere, substantially effect interstate commerce," and then concludes that a sufficient connection to interstate commerce does not exist. Likewise in *Morrison*, the Court simply proclaims, without analysis, that "[g]ender motivated crimes of violence are not, in any sense of the phrase economic activity" and proceeds through its four factor test. The lack of apparent standards for distinguishing economic activity from non-economic activity, has arguably allowed the lower courts to characterize mere possession of contraband as "non-economic" behavior and thus, beyond the jurisdiction of Congress. Whether this characterization holds across the wide range of federal statutes that attempt to punish mere possession of contraband is unclear. What appears to be clear, however, is that if the Supreme Court accepts the lower court's conclusion that mere possession of contraband is non-economic behavior, then the ramifications on Congress's power under the Commerce Clause could be substantial.

In addition to the federal statutes punishing possession of child pornography, certain firearms, and certain controlled substances, Congress has enacted similar possession laws with respect to a wide variety of activities, including, but not limited to biological weapons,[66] nuclear materials,[67] obscene materials,[68] and federal badges, identification cards, and other insignia.[69] All of these statutes were likely enacted pursuant to Congress's Commerce Clause power. Should the Supreme Court accept the rationale that mere intrastate possession is beyond the power to Congress to regulate, statutes such as these would likely have to be reconsidered and amended to conform with the Court's ruling. Each of these statutes, like the statutes in *McCoy, Stewart,* and *Raich*, is susceptible to a narrow reading that distinguishes intrastate possession with no involvement in commerce, from the commercial activity that would invoke federal jurisdiction. For example, it is possible that a home scientist could create a prohibited biological weapon in his home with no intent to engage in its sale or distribution. Under the Ninth Circuit's reading of *Lopez* and *Morrison*, federal prosecution for violation of 18 U.S.C. § 175, would likely be unconstitutional, as Congress's power under the Commerce Clause does not extend to mere intrastate possession. Clearly, the federal government has an interest in prosecuting this type of behavior, and the consequences of waiting for a sale or other "commercial activity" could be disastrous. It is important to note that the activity

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[66] 18 U.S.C. § 175 (2003).

[67] 18 U.S.C. § 831 (2003).

[68] 18 U.S.C. § 1466 (2003).

[69] 18 U.S.C. § 701 (2003).

would likely be illegal and punishable under state law, but the states may not always possess the expertise, manpower, or financial resources to effectively track down and prosecute such behavior. Thus, if the Court were to adopt the restrictive reasoning of these rulings, Congress would either have to locate another source of federal power to justify its actions, or amend the statute to contain the necessary connection to "commercial activity" and interstate commerce.

A review of alternative sources of federal power that may allow Congress to regulate the mere intrastate possession of contraband reveals very limited options. Because the courts have rarely found it necessary to look beyond the Commerce Clause, the case law on alternative sources of legislative authority is sparse. The cases, however, do include a reference to the Treaty Clause in Article VI, which makes international agreements signed by the President and ratified by the Senate, the "supreme law of the Land."[70] Thus, to the extent that the United States has treaty obligations regarding a specific type of contraband, it appears that this clause could be used to regulate intrastate possession. To date, however, it appears that this clause has only been cited with respect to narcotics laws.[71]

In addition, there is the possibility of using the Spending Clause[72] combined with the Necessary and Proper Clause[73] to regulate possession. While there do not appear to be any cases directly on point with respect to using the taxing and spending power to regulate intrastate possession, the Supreme Court in *Sabri v. United States*[74] recently held that Congress has general authority under the Spending Clause in conjunction with the Necessary and Proper Clause of the Constitution to enact criminal legislation.[75] Given that this case involved allegations of bribery and fraud, it is not clear whether this authority under the Spending Clause would extend to

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[70]*See* U.S. CONST. Art. VI., cl.2.

[71]*See United States v. Rodriquez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972) (stating that "the United States is a party to the Single Convention on Narcotic Drugs binding, *inter alia*, all signatories to control persons and enterprises engaged in the manufacture, trade and distribution of specified drugs. Marijuana (cannabis) is so specified. Enactment of § 841(a)(1) is a permissible method by which Congress may effectuate the American obligation under the treaty.").

[72]U.S. CONST. Art. 1, § 8, cl. 1 (stating that "Congress shall have the Power to . . . pay the Debts and provide for the common Defense and general welfare.")).

[73]U.S. CONST. Art. 1, § 8, cl. 18 (providing Congress with the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.").

[74]*Sabri v. United States*, 124 S. Ct. 1941 (2004).

[75]*Id.* at 1946. (stating that "Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars.").

include mere intrastate possession of contraband. If, however, an effect on the federal financial welfare can be demonstrated, it appears possible that the Spending Clause could be cited as an alternative source of power to the Commerce Clause. It may also be possible to interpret the Court's decision in *Sabri* as suggesting that the Necessary and Proper Clause associated with other Article I powers could have the potential of filling gaps left by a restrictive interpretation of the Commerce Clause. Presently, however, there appear to be no federal cases suggesting that such a use of the Necessary and Proper Clause would be proper.

The second potential area of Commerce Clause jurisprudence that the Court could look to clarify is under what circumstances the expansive aggregation theory from *Wickard v. Filburn* may be utilized. Currently, lower courts appear to be relying on the language in *Morrison* declining to establish a rule prohibiting the aggregation of the effects of non-economic activity,[76] as a means of distinguishing *Wickard*. It is not clear, however, that this interpretation is necessarily what the Court intended as it appears to create a two step analysis for avoiding *Wickard*: first, define the activity in such a way as to make it non-economic, and; second, refuse to aggregate the substantial effects, thereby finding the law unconstitutional.

Since *Wickard* was cited favorably in both *Lopez* and *Morrison*, it has not been overturned and thus, is still controlling law. Should the Court decide to overturn *Wickard*, it would make it difficult to justify any congressional action that regulates mere intrastate possession as there would be no mechanism in place that would allow the Court to consider the effects, substantial or otherwise, of the activity on interstate commerce. Should this occur, Congress would effectively be stripped of a tremendous amount of regulatory power, and would be forced to either amend numerous pieces of legislation, or find an alternative source of authority. Such a decision could extend far beyond the intrastate possession cases and possibly calls into question the entire body of "substantial effects" case law. While this option remains possible, it does not appear likely that the Court will overturn *Wickard*. Rather, it appears more likely that the Court will attempt to more closely define the types of situations where the *Wickard* test applies. This option arguably preserves the outer limits of the commerce power, and allows the Court the ability to more closely define where the boundary lies.

While it is impossible to predict precisely where the Court would draw the line, it appears conceivable that it could construct the standard in such a way that would preserve Congress's ability to regulate the intrastate possession of contraband where a definable national market exists, such as with respect to child pornography, firearms, and controlled substances, without extending to the federal government the ability to regulate hobbies, collections, or other forms of purely intrastate, non-commercial activity. Alternatively, it appears possible for the Court to expand *Wickard's* application to permit the substantial effects of activities to be considered even with respect to non-economic behavior. This interpretation, if adopted, would arguably expand Congress's authority under the Commerce Clause back in the direction that it was prior to *Lopez* and *Morrison*.

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[76] *Morrison*, 529 U.S. at 613.